No. 3957

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. MILLER,
Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,
Defendant in Error.

Defendant

BRIEF OF ~~PLAINTIFF~~ IN ERROR

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STATEMENT OF THE CASE

In January, 1921, plaintiff in error, hereinafter called the "plaintiff," instituted an action in the District Court of the United States for the Eastern District of Washington, Northern Division, against the defendant in error, hereinafter called the "defendant." According to the complaint filed therein, on July 28, 1919, the plaintiff was an engineer in the employment of the defendant in interstate commerce. While his engine was standing upon the line, he stepped upon the apron between the locomotive and tender and slipped and fell from the engine, sustaining serious injuries. As grounds of negligence, he alleged a violation of Section 117 of the Regulations of the Interstate Commerce Commission under the Boiler Inspection Act, as amended to include locomotives, said section being as follows:

> "Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing."

He further alleges that the apron was not constructed so as to fit smoothly nor was it on a level with the floor of the tender, as a result of which it extended upward about an inch or an inch and a half therefrom, and that at the time of the accident the plaintiff caught his foot in said apron which caused him to slip upon the apron. He further alleges that said apron was not roughened or otherwise made to afford

secure footing. (Tr. 17-23). This action proceeded to trial, and, as a result thereof, a verdict in favor of the defendant, upon which verdict, judgment was duly entered. (Tr. 14). Thereafter the present action was instituted, in which action a complaint was filed, plaintiff in the meantime having changed counsel, in which complaint it was alleged:

First: That a part of said apron had not been roughened.

Secondly: That it was approximately nine inches too short at each end, to insure safety; and

Thirdly: That by reason of said shortage, there was a hole between the tender and the locomotive through which plaintiff slipped. (Tr. 5). Therefore an amended complaint was by leave of court filed, in which amended complaint the allegation of the smoothness of the apron was omitted and the defendant was alleged to have been negligent in violating said Section 117 of the Regulations of the Interstate Commerce Commission, in that apron was approximately nine inches too short and in that Rule 152-C of the Commission which is as follows:

> (c) "The minimum width of the gangway between locomotive and tender, while standing on straight track, shall be sixteen (16) inches."

was violated, in that the minimum width of the gangway was less than sixteen inches.

Defendant answered this amended complaint setting forth the pendency and result of the first action. (Tr. 11-14).

To this answer defendant replied admitting that the accident referred to in the amended complaint was the same accident set forth in the complaint in the first action commenced by plaintiff against defendant. (Tr. 26).

Thereupon defendant moved for judgment on the pleadings (Tr. 28). This motion being granted (Tr. 61) the present appeal is prosecuted.

ARGUMENT

But one question is presented by this appeal, to-wit:

Where an employee of a railway company has been injured while in its service and brings an action against it to recover damages for alleged negligence, must such employee specify in his complaint all the grounds of negligence of his employer whether statutory or common law, or be deemed to have waived them? The question may be put another way. Where a number of grounds of alleged negligence on the part of a railway company exist, may an employee institute suit upon one ground and failing to recover upon that ground select another and so continue until a jury has rendered a verdict in his favor?

We have examined with great care the brief of plaintiff in error and with due regard to the standing of counsel, we must confess our inability to comprehend his theory. The law upon the question is so plain that it would seem that no argument or citation of authority is necessary to sustain the judgment of the learned Judge of the lower court. The doctrine of res adjudicata, of which the rule against splitting of causes of

action is a part, seems to be conclusive against the contention of the plaintiff. In the case at bar, it appears that violations are alleged of two sections of the rules of the Interstate Commerce Commission. If the present action may be maintained, then what is the logical result? Upon the occurrence of the accident in question, plaintiff might have brought an action alleging the negligence of the carrier to be that the apron was not of proper length to insure safety. Failing in this action, he might bring a second action alleging that the apron was not a proper width to insure safety. Failing in this, a third action that the apron was not securely hinged. Failing in this, a fourth, that the apron was not roughened. Failing in this, a fifth, that the minimum width of the gangway was not 16 inches. Failing in this, a sixth common-law action that the apron stood above the level of the tender. And failing in this, a seventh, that the accident would not have occurred, had the defendant placed a hand hold in the proper place upon the tender or locomotive. The case would be analagous to one where a pedestrian was struck by an automobile, in a state where, under the statute, a violation of any of the laws regulating the operation and management of a motor vehicle would entitle a person injured to recover damages for his injuries from such operator. We can conceive of a case where an injury might be caused by one or all of the following acts of negligence, each being a violation of a provision of the statute.

(a) Reckless driving;
(b) Driving faster than the statutory rate;

(c) Failing to blow a horn;
(d) Failing to have lights on the automobile;
(e) Defective brakes.
(f) Failure to keep to the right of the road;
and so on ad infinitum.

It seems to us that it is unnecessary to go further. The true rule applicable to the question here presented is so well set forth in the opinion filed in the lower court, that we cite the same verbatim.

RUDKIN, District Judge. This is an action to recover damages for personal injuries. The answer interposes the defense of *res adjudicata,* and inasmuch as that defense has not been denied the defendant has moved for judgment on the pleadings. One of the regulations of the Interstate Commerce Commission regarding cab aprons is as follows:

"Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing."

In a former action prosecuted by the same plaintiff to recover for the same injuries the neglect charged in the complaint was two-fold. First, because the cab apron was not roughened or other provision made to afford a secure footing as required by the regulations of the Interstate Commerce Commission; and second, because the apron extended upwards from the floor of the tender a distance of from one to one and one half inches. Upon a trial of that action there was a verdict and judgment for the defendant.

In the second action to recover damages for the same wrong and for the same injuries a recovery is sought on the ground that the cab apron was not of proper length and width to insure safety. Upon the argument I was of opinion that the former judgment was a complete bar, and an examination of the authorities only tends to confirm me in that opinion. The plaintiff earnestly insists that he has a right of action for each and every breach of a statutory duty and that a judgment against him in an action for one breach is no defense to a second action for another and different breach, although the injuries complained of in both actions are one and the same. To this contention I cannot yield assent, and the decisions in both the state and federal courts are against it.

In Sayward vs. Thayer, 9 Wash. 22, Chief Justice Dunbar said:

"The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

To the same effect, see Cromwell vs. County of Sac, 94 U. S. 351, and Board of Com'rs. vs. Platt, 79 Fed. 567. The scope of the estoppel is not the same in all cases. Thus, where the second action is between the same parties but upon a different claim or demand, the estoppel is limited to the points in issue and actually determined in the first action. But where the second action is upon the same claim or demand the estoppel

extends not only to the points at issue in the first action but to all claims and all defenses that might have been advanced or interposed by the respective parties. This distinction is clearly pointed out in the Cromwell case, *supra.* And inasmuch as the second action here is upon the same claim or demand as was the first, the estoppel extends not only to the matters at issue in the former action but to each and every claim of negligence which the plaintiff might advance in support of his right of recovery. No doubt, as claimed by the plaintiff, the law gives a right of action for each and every breach of a statutory duty, but where several breaches result in a single injury it gives but one right of action and no more. And under this rule it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state or federal statute. As said by the Court in Jenkins vs. Atlantic Coast Line R. Co., 179 Fed. 535, 539:

"This is an entire claim for a single tort, and all the various items tending to show negligence on the part of the carrier, and all of the elements of damage to her resulting from such negligence must be included in the one action wherein she is entitled to recover such compensation as she may be entitled to for each and all of such items."

" 'Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation.' "

Or, as said by Judge Dunbar in Sweeney vs. Waterhouse & Co., 43 Wash. 613, 616:

"It is hardly worth while to go into a discussion of the doctrine of *res adjudicata* and the cases cited thereon. This court has, in more recent cases, some-

what modified the doctrine as announced in the earlier cases, where the old rule was laid down that the plea of *res adjudicata* applies not only to points which were raised, but to those which might have been raised in the trial of the former action. But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal. The cause of action which the appellants now urge was available to them at the former trial, the assignments set forth in the complaint having been obtained prior to the commencement of the first action. They should not be allowed to split their causes of action, try their case out on a part of the causes and, if they fail, commence another action setting forth the other causes."

The motion for judgment on the pleadings is therefore granted, and the action is dismissed.

It is said that: "Good wine needs no bush," and we therefore desire only to add to the foregoing opinion a comment upon the case of Jenkins vs. Atlantic Coast Line Railroad Company, 179 Fed. 535, cited in the opinion. That case was one where a passenger instituted an action against a carrier and alleged in her complaint in addition to other grounds of negligence, that the train upon which she was riding was driven at a dangerous rate of speed. This action was brought in the state court. After a verdict for the defendant judgment was rendered thereon. The second action was then instituted in the Federal Court alleging the former and other grounds of negligence. The Judge of the Federal Court properly held that the second action was barred by the first.

The Jenkins case is a well considered one and we invite the court's careful consideration to it. It is well

worth reading for the reason that although it is said that "There is nothing new under the sun," a most careful reading by the writer of this brief of all the cases, has disclosed the fact that the Jenkins case was unique until the ingenuity of the present counsel for the plaintiff was put into operation.

The case next nearest in fact and in principle to the case at bar is that of Gilligan vs. The Sun etc. Association, 54 N. Y. Sup. 471. There the plaintiff sued for an alleged libel, it appearing that an article containing three distinct libellous charges had been printed in the defendant's paper. Action was brought to recover on the ground of the alleged falsity of one of the three charges. A verdict for six cents damages was had and paid. Thereupon the plaintiff instituted a second action to recover damages for the libel contained in the other two charges and for a republication of the article in a subsequent edition. It was held that the second action could not be maintained; that the first action was res adjudicata and that the causes of action could not be split. The question presented in the case at bar being in our opinion, too plain for extended argument, we forbear to discuss it further. The judgment of the lower court should be affirmed.

Respectfully submitted,

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